Supreme Court, U.S.
FILED

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No 05-3585

04-cv-2210

In The

Supreme Court of the United States

Washington DC

BETTY J. BLUE, Pro, se

Petitioner,

v.

DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
DLA/DSCP

Respondents.

On Petition For Writ OF Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. If the U.S. Congress explicitly stated that " TITLE III of the CIVIL RIGHTS ACT OF 1991-Public Law No. 102-166 Nov. 21, 1991 is to be considered and cited as the GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991," in a discrimination and retaliation employment complaint filed by a government employee against a government employer doesn't in fact this new TITLE (TITLE III OF 1911) preempts TITLE VII of the 1964 CIVIL RIGHTS ACT?

2. Was the plaintiff's and members of the class First, Second and Fourth Amendments of the U. S. Constitution violated when the case, without legal representation and at the request of a party that was not named as a defendant, was prematurely dismissed before the discovery began, before deposition could be taken and before pre-trail memorandum was filed?

3. Was the plaintiff's and members of the class First, Second and Fourth Amendments of the U. S. Constitution violated when the lower Court during the 2004-2005 period failed to actually assign a court appointed counsel despite the that from the beginning plaintiff's request for court appointed attorney was granted?

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OPINIONS BELOW

The opinion of the Court of Appeals dated May 24, 2006 can be found at (3d Cir LAR 34.1 (a) (App. A) The unpublished opinion of the district courts set forth at (App. B)

BASIS FOR SUPREME COURT JURISDITTION

The Court of Appeals for the Third Circuit entered its ruling on May 24, 2006. Plaintiff petitioned for rehearing on 7/5/06. The court of Appeals denied the petition on July 18, 2006 (App. C). Plaintiff pro se. Petitioned the Supreme Court for 60-calendar day extension to 12/16/06 on October 5/06. Supreme Court granted Plaintiff's request to no later that 12/15/06. The Supreme Court is authorized to consider this case pursuant to 28 U. S. C 1254(1)

STATUTES AND REGULATION INVOLVED IN THE CASE

42 U.S. C 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the part injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

PUBLIC LAW 102-166 STAT 1088: SEC 301 Government Employee Rights Act of 1991. :2 U. S. C. 1201-SEC.301 (b) Purpose.- The purpose of this title is to provide procedures to protect

the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability; and Sec 301©(2) **HEAD OF EMPLOYING OFFICE.-**
The term "Head of employing office" means the individual who has final authority to appoint, hire, discharge, and set the terms and conditions or privileges of the Senate employment of an employee.

OTHER

EEO REPORT OF INVESTIGATION Agency complaint TA-00-008, Non-referral –Submitted 11/27/01. Section V: pages 10-11-12-FACTUAL FINDINGS-ALLEGATIONS. ALLEGATIONS: The Complainant was discriminated against on the basis of age, race, and sex when she was not referred for consideration for the positions of Contract Specialist Gs-1102-11 or target Gs-1102-12.

FACTS:
A. The complaint is a 54 year old African American female (Exhibits A. B. C, J)
B. The Complainant has been a Contract Specialist GS-11 for eight years. (Exhibits A, B, C, J)
C. The Complainant applies for a vacancy under JOA DSCP-00-528, was not referred for consideration. (Exhibits A. B. C. J)
D. Candidates not of he same protected group as the Complainant was referred for consideration. (Exhibit A. Section 13).

E. Ms Maokhamphiou, Personnel Staffing Specialist was responsible for the rating and ranking of he Applicants. (Exhibits A. B. C. J, K)

5 USC 2302 at seq Common Law Pennsylvania Prohibited Personnel Practices. This law provides guideance of Federal laws that prohibit job discrinimation, based on race, color, religion, sex national origin, disability, or age. Prohibits retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discrimination practices.

F. Ms. Maokhamphiou stated that the Complainant was not referred because she did not score high enough for the in question. (Exhibit A, K)
G. The Complainant alleges that she met all of the requirements for the positions (Exhibits A. B. J. L).
K. Records indicates that prior to this JOA, the Complainant was ranked and rated as a GS-1102-12. (Exhibits A.J. L)
L. The record revealed that the Complainant met the requirements of he JOA (Exhibits A.J. L). Initial contact for this complaint was 02/11/00; date of initial interview 03/02/00, date of alleged discriminatory event 01/10/00, date of final interview: 06/15/00; date counseling report requested 06/29/00. The personnel specialist referred an individual 47 years old with a higher ranking than Plaintiff; when the individual was not of the protected group and did not possess the mandated education.

DIACONU v. WILLIAM J. PERRY, SECRETARY OF DEFENSE cv. 96-0214(U.S. S. CT. CERT. Denied)

ORDERED 11/12/96

And now, this 8th day of November, 1996 for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant for summary judgment is GRANTED in part and DENIED and that:

(1) Judgment is entered in favor of defendant William J. Perry, the Secretary of Defense, and against plaintiff Eufrosina Diaconu on the claims of national origin discrimination, age discrimination, retaliation for activity protected by 42 U. S. C 2000E et seq., and intentional interference with advantageous contractual relations.

(2) Summary judgment as to plaintiff's claim for sex discrimination is DENIED

(3) Decision is reserved on defendant's motion for summary judgment on the claimed violation of he Whistleblower Protection Act until the transcript from the hearing before the Merit Systems

Protection Board is waived; unclear from Diaconu's complaint whether she is alleging a violation of -766 or -766A of the Restatement (Second) of Torts. Therefore, we will address both sections. Section 766, entitled "Intentional Interference with Performance of Contract by Third Person" states:

> (o)ne who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (second of Torts 766

The only defendant now in this case is William Perry, as Secretary of Defense. Since any contract was between Diaconu and the DLA, as an agency of the government, any claim by Diaconu is quite limited. Even assuming she can sue under state law, there is no cause of action for tortuous interference against a part to the contract in question.

O'Neil v. ARA Serv., Inc., 457 F. Supp. 182, 188 (E.D. Pa. 1978). Moreover, an individual executive of the contracting party is also not liable unless his or her role motive is causing the breach was "actual malice directed toward the plaintiff." or if the executive was acting for his or own person interests and not those of the contracting party.

REPORT OF INFORMAL INQUIRY AT DSCP AUG. 1994.

Section (4) pg 7-**CONCLUSION:** Para. D(2); Many managers hold the attitude that EEO is only for minorities and do not support the program or attend the training

s/ LTC Bodenhamer

Ervin R. Armstrong, et , al., Complainant v. Paul H. O'Neil Secretary, Dept. of Treasury Agency.
July 23, 2002

Acceptance of Class Action:

SUMMARY

The Commission reversed and remanded the agency's final order and found there was sufficient evidence to satisfy the Class agent's burden of establishing Commonality, Typicality and adequate class representation with evidence, provided by the complainant comparing the numbers of African Americans and whites whom allegedly have affected the agency's policy of training and policy for providing assignments and details. Complainant alleged that the agency engaged in pattern and practice of discrimination against African American with regard to training, promotions, details selection practices.

Burden et al., v. Apfel, Commissioner SSA EEO Class Action Complaint.

EEO recommended decision to accept the complaint in May 1997.

SSA refused to accept the recommendation and in July 1997 asked for Reconsideration in August. In January 1999, the EEOC denied SSA's request and ordered SSA to notify all African American males employees at Headquarters that were potential members of the class complaint.

29 CFR 1614-204-**Class Complaints:**

(a) **Definitions:** (1) A class is a group of employees, former employees or applicants for employment who it is alleged have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color religion, sex, national origin, age, or handicap.

(2) A Class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the numbers of the class is impractical;

(ii) There are question of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class

(iv) The agent of the class or if represented the representative, will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

At all relevant times plaintiff, Betty J. Blue, pro, se and African American female, now, 60 years old, was and still is a civilian employee working for the Defense Supply Center Philadelphia (DSCP) located in Philadelphia, Pennsylvania. At all relevant times DSCP was and still is a field activity of the Defense Logistics Agency (DLA) located in Fort Belvior, Virginia. A government owned and government and contractor operated (GOGO/CO) CIVILIAN AGENCY, DLA/DSCP'S MISSION IS TO SUPPORT THE U. S. Department of Defense (DoD) located in Washington DC. On 3/9/99 DLA/DSCP issued Job Opportunity announcement (JOA) # DSCP-99-155 for two Contract Specialists GS-1102-12 positions in the Medical Directorate. Plaintiff Betty J Blue who for many years worked in the Medical Directorate, was one of the applicants. After the first round of selections, about six additional positions were opened under the same JOA. Although the Plaintiff exceeded the mandatory education requirement and already worked in the same office where the positions were filled she was not selected. Two positions went to individuals outside the directorate. The Plaintiff was informed that she did not do well in the interview that took place in August 1999, but nothing specific.

Because plaintiff was aware of many other similar situations occurring with many other African American female civilian employees, on September 8, 1999, plaintiff Blue contacted the DSCP EEO office with the intent of filing a class action discrimination and retaliation complaint against DLA/DSCP. Blue identified as members of the class all the African American females GS-6 to GS-12. In fact the DSCP EEO Counselors' Report Agency No.: TA-00-007C, dated 9/15/00 states that "Date of Initial Contact: 9/8/99. Date of Interview 10/04/99 and date of Alleged Discriminatory Event 8/9/99, 45 Days after event: On August 9, 1999, Class Agent received a non-selection letter for Contract Specialist GS-1102-12 (JOA #DSCP-99-155). Incident was within 45-day time frame. "Counseling could not be effectively completed in 30 days, the date of final interview 6/12/00, date Counseling Report Requested 6/29/00 and date Counseling Report submitted 9/15/00".

While the DSCP EEO Counsel was gathering statistics for the CLASS ACTION REPORT, plaintiff Blue continued to apply for vacancies within DSCP. In 2000 Blue applied under JOA #DSCP-00-528 and under JOA # DSCP-00-1709. Blue again was not referred/selected for any of these positions: they went to white males or females outside the Medical Directorate and/or region with little or no experience in the contracting field. Learning on 2/10/00 that she was not referred for JOA # DSCP-00-528 position, on 2/11/00 Blue Plaintiff contacted the DSCP EEO Office and filed the discrimination and retaliation complaint; Agency case number TA-00-008. "Counseling could not be effectively completed in 30 days, the date of final interview was 06/15/00; the date Counseling report submitted was 02/02/01." The TA-00-008 discrimination and retaliation complaint was investigated by Catherine Price, EEO Contract Investigator determined that the 15 alleged acts of discrimination and retaliation against Blue Plaintiff each and every one of them indeed did occur. On 11/27/01 DLA/DSCP denied Blue Plaintiff's the discrimination and retaliation complaint No. TA-00-008 despite the investigator's findings. DLA stated that "no discrimination could have occurred because the personnel specialist did not know Plaintiff, Blue.

While DLA/DSCP was investigating this complaint (TA-00-008), DLA/DSCP refused to conduct mediation with Plaintiff or to issue a letter of final interview. DLA/DSCP refused to certify the CLASS ACTION discrimination and retaliation complaint on the grounds that (1) the agency preferred individually filed discrimination and retaliation complaints instead of a class action complaint; (2) that the eight identified African American females and members of the class while they all worked for the same agency, they didn't work in the same office and the same directorate as Plaintiff, Blue or with each other; (3) Plaintiff Blue was not a lawyer, therefore was not qualified to represent the members of the class and (4) the members of the class was too numerous (estimated by DLA/DSCP to be approximately 500-800 employees and up to 500 based on agency provided statistics to Plaintiff Blue, and (5) Because members of the class were not the same job series nor the same grade level of Plaintiff or each other.

In July 2000 Blue requested mediation at the agency level which

was denied. In October 2000 Blue appealed DLA/DSCP's decision not to certify the CLASS ACTION to the EEOC Philadelphia Office. In August of 2002, the Administrative Judge (AJ), EEOC Philadelphia Office issued an order to dismiss the complaint for failing to meet the criteria of numerosity and typicality. In September 2002 Blue Appealed the AJ's decision to the EEOC-OFO Washington DC who responded two years later, January 2004, upholding the AJ's order to dismiss the class action for failing to meet the criteria of commonality only and ordered that DLA/DSCP investigate plaintiff's issues individually. DLA/DSCP never complied with the EEOC-OFO's order.

Plaintiff submitted additional/new information with a request for reconsideration to the EEOC-OFO. By order dated February 26, 2004 EEOC-OFO denied Plaintiff's request for reconsideration the result of which on May 18, 2004, Blue timely filed in the U. S. District Court For the Eastern District of Pennsylvania (E. D. Pa) the instant Class Action discrimination and retaliation complaint against the DEFENSE LOGISTICS AGENCY, DEFENSE SUPPLY CENTER PHILADELPHIA, DLA/DSCP.

On May 18, 2004, Plaintiff also petitioned the E. D. Pa (1) to allow plaintiff , pro se, to proceed as a class representative; (2) to consolidate Plaintiff's unresolved discrimination and retaliation complaint no. TA-00-008; (3) to consolidate all the discrimination and retaliation complaints filed by African American females with DLA/DSCP EEO within the same time period from June 2000 to May 18, 2004 that have not be mediated and/or resolved according with the guidelines of 29 CFR 1614 regarding complaints addressing same or similar issues. Plaintiff's Motion for Court Appointed Counsel filed 7/23/04 was approved by presiding judge, the Hon. John P. Fullman, Sr. on 7/29/04. Despite its approval, during the life of the instant case in the E. D Pa Court no counsel was actually appointed. Despite the fact that the Hon. Donald H. Rumsfeld, Secretary of Defense and the U. S. Department of Defense (DoD) was not named as defendant on the case, nor did DoD ever file a petition as a friend of the court, ignoring the evidence in the file, the U, S. District Court E. D. Pa. Per the Hon J. P. Fullman, Sr. dismissed the case in its entirety on the Summary Judgment dismissal request filed by the Hon. Donald H. Rumsfeld, Secretary of Defense. Among

the evidences ignored by the Hon. Judge J. P. Fullman, Sr., significant is the Report dated October 30, 1999 prepared by the Lt. Col. Bodenhimer, for DSCP's Commanding Officer, who determined that at DSCP the supervisors not only engaged in gross acts of discrimination and retaliation against minorities (primary African American females) but, they viewed Civil Rights Act of 1964 something they were not obligated to comply with, only if they elected to do so. The Government Employee Rights Act of 1991 was not even acknowledged. On 7/5/05, Plaintiff pro se, filed a Request For Reconsideration on the ground that: (1) DoD was not a defendant on the case neither by the Government Employee Civil Rights Act of 1991 not the actual facts; (2) DoD was never served with the summons and complaint, therefore, DoD actually never responded tot he issues subject to the instant case; (3) DoD's Motion For Summary Judgment address facts invented by the DoD in order to support its motion; (4) the dismissal of the case accommodated DLA/DSCP preference of addressing only individually filed discrimination and retaliation complaints instead of a class action complaint; (5) the dismissal failed to address Plaintiff's individual issues and (6) should the E. D. Pa. actually assigned a court appointed attorney, the members of he class could have been represented by a lawyer. Plaintiff Blue's Request for Reconsideration was also dismissed per Order entered on 7/14/05.

The District Court For The Eastern District of Pennsylvania had subject matter jurisdiction of Plaintiff's federal claims under 28 USC 1331 because plaintiff's and the members of the class claims arisen in this district and under 42 USC 1983. It had jurisdiction because at all relevant times Plaintiff and the members of the class referred to herein was and is now employed by DLA/DSCP who were named defendant in their official capacity as agency; all within the meaning of the TITLE III of the Civil Rights Act of 1991 and all previous civil rights acts promulgated by the U.S. Congress and signed into effect by the U. S. President(s). Also, plaintiff pro se and members of the class as Government employees complied with all pre-conditions to sue applicable to Federal Government employee; it has fully complied with 29CFR 1614 at seq. Federal Sector and cooperated and fully complied with DLA/DSCP/EEO-OFO guidelines and regulation during the administrative stage of the instant case.

Plaintiff pro se, invoked the E. D. Pa. jurisdiction with the claims based on the Common Law Pennsylvania prohibited personnel practices under 5 USC 2302 at seq. And under the Declaratory Judgment Act 28 USC 2201 and 2202.

On July 25, 2005 Plaintiff pro se appealed to the U.S. Court of Appeals For the Third Circuit the lowers court's final decision. The Third Circuit upheld the E.D. Pa.'s final decision on the ground that: (1) that although DoD was never named a defendant in the case not did DoD ever file a petition with the court to interject as a friend of he court in favor of DLA/DSCP, it was at the presiding judge's discretion to accept and to grant DoD's Motion For Summary Judgment. (2) It was at the presiding judge discretion to grant a summary judgment made by a non party defendant (a) before the discovery was completed, (b) before the disposition was taken and (c), before a pre-trial memorandum was served/filed. (3) The Third Circuit's position was that while under TITLE III-Government Employee Rights Act of 1991 DoD is not and could not be considered a defendant, the E. D. Pa and the Third Circuit in the past has allowed DoD to substitute for DLA/DSCP under Title VII of the Civil Rights Act of 1964; so they considered that, the plaintiff and the DoD, were correct ; leaving this issue to be decided by the U. S. Supreme Court. (4) Totally ignoring the Government Employee Rights Act of 1991. The Third Circuit reliance exclusively on the Civil Rights Act of 1964 is evident from the cases they cited to support their decision e.g. BROWN v. GEN. SERV. ADMIN. 425 US 820 (1976), TEXAS DEPT. OF COMMUNITY AFFAIRS v. BURDINE, 450 US 248, 252-53 (1981), McDONNELL DOUGLAS v. GREEN, 411 US 792,802 (1973, BENNUM v. RUTGERS STATE UNIV. 941 F2d 154 170 (3rd.Cir. (1991) just to name a few. Absolutely none of the cases cited by the E.D. Pa and by the Third Circuit factored in the Civil Rights Act of 1991 nor the TITLE III-Government EMPLOYEE RIGHTS ACT OF 1991.

From the beginning Plaintiff's employer, DLA/DSCP, refused to certify the class complaint (1) for its own convenience and own preference to individual and not class cases, (2) because the eight identified African American females, Plaintiff, Blue and the members of the class were not of the same series and grade and they were not working in the same office and in the same directorate. Neither 29

CFR 1614 at seq., nor the Federal Rules for Civil Procedures 23(a); neither TITLE III-Government Employee Civil Rights Acts of 1991 nor TITLE VII of the Civil Rights Act of 1964 nor did the U. S. Supreme Court ever request that in an employment discrimination and retaliation class complaint that all member of the class and the Plaintiff(s) work in the same directorate, same office and be in the same series and at the same grade level. In the instant case the common denominator was the denying of advancement/promotion for African American females GS-06 to GS-12 for the 1102 's and all support series. The type of acts of discrimination and retaliation against these females, Plaintiff included, took different forms such denying training or desk audits or the opportunity to work special projects which provided opportunity for advancement. This in turn disqualified them for referral and a chance for selection even though they possessed or surpassed the educational requirement, and at times were performing the duties of the positions in which they were denied. This meets the Fed. R Civ Pr. 23(a): 1) numerosity, 2) commonality, 3) typicality. The 4th requirement, ADEQUACY OF REPRESNTATION was also moot. The Hon. J. P. Fullman, Sr. E. D. Pa granted Plaintiff, Blue's Motion for Court Appointed Counsel on 7/29/04. "More significantly, Plaintiff is acting pro se and cannot adequately represent the class. "Despite Blue's earnest attempts, it would be unjust to bind other members of the proposed class to the efforts of a pro se plaintiff." This is an erroneous and moot statement; erroneous in the light that the lower court approved a court appointed counsel and moot on the ground that the approval by the E. D. Pa. of a court appointed counsel was never retracted. Should the E. D. Pa. actually appointed an attorney, the instant case would have no longer been a pro se case and the members of the class and Plaintiff as well would have been adequately represented by a U. S. Bar Association Attorney.

Plaintiff never challenged neither she does she challenge now the District Court or the Third Circuit's granting of Summary Judgment to an Appelee. What Plaintiff, Blue challenged before and now, are both lower court's refusal to address WHO IS THE RIGHT DEFENDANT/APPELLE? DoD or DLA/DSCP. The Motion for Summary Judgment was made by DoD and not DLA/DSCP.

DoDLA/DSCP NOT IS THE PROPER DEFENDANT:

(1) Pursuant TITLE III- Government Employee Rights Acts of 1991 DoD is not Plaintiff's or the members of the class the "head of the office who hires and fires. (2) On the instant case Blue never named DoD as a defendant-see roaster @ (3) DoD was never served with the summons and complaint. (4) Prior to filing the Motion for Summary Judgement DoD never actually responded to the complaint. (5) DoD never filed a motion to intervene as a friend of the court, (6) nor did DoD during the life of the instant case ask the court for permission to substitute for DLA/DSCP. (7) While prior to being allowed to file a complaint in a U. S. District Court a federal government employee must pass and meet some stringent administrative procedures, DoD is not in this loop. e.g. The final agency decision not to certify the complaint as a class was made by DLA/DSCP and not DoD. From DLA/DSCP the complaint was appealed to the EEOC Philadelphia and EEOC-OFO Washington DC and not by DoD. (8) The right to sue was given by EEOC-OFO and not by DoD. (9) In DIACONU, PRO SE v DLA at al., 95-cv-0214 E.D. Pa. (Cert. Denied) (the 3rd Circuit and the E. D Pa) after, eliminated DLA/DSCP as defendant and substituted them with DoD, it has dismissed the case on the ground that the employment contract was between Diaconu and DLA/DPSC and not Diaconu and DoD. This rational was based on TITLE VII of the Civil Rights Act of 1964.

DLA/DSCP is the only defendant. (1) Is the "head of the office" as defined by TITLE III-Employee Rights Act of 1991: (2) it was served with summon and complaint. (3) DLA/DSCP never asked the court for permission to be eliminated as defendant. (3) The request for dismissal of the case was not made by DLA/DSCP. (4) Actually DLA/DSCP never responded to Plaintiff's Blue Motion for Summary Judgment, submitted on 02/01/05/. (6) DLA/DSCP was and still is Plaintiff's and the members of the class' employer. (7) Even as this writing, any EEO discrimination and retaliation complaint filed by a DLA/DSCP employee is never forwarded to DoD for its final decision; it stops at DLA/DSCP agency level and is then appealed EEOC/EEOC-OFO and then to the U.S. District Court.

REASON FOR GRANTING THE PETITION

Because the lower courts requires federal government employees to go through stringent administrative procedures prior to accepting a case, it is important that a clear understanding of which Civil Rights Act applies: 1991 or 1964? Who is the defendant: DoD or DLA/DSCP. When does a civilian federal government pro se plaintiff in an employment discrimination and retaliation complaint has been granted the right from the beginning a court appointed attorney; yet in almost two years no counsel was actually appointed; wasn't this alone a continuation act of discrimination and retaliation by the lower courts against the plaintiff, pro se.

The statutes are clear and unambiguous; both the lower courts refused to address plaintiff's issues and refused to certify the class because class representative was pro se.

CONCLUSION

For the preceding reasons, petitioner, pro se requests that this Court grant her petition for certiorari.

Respectfully submitted

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APPENDIX - A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3585

BETTY J. BLUE
Appelant

v.

DEFENSE LOGISTICS AGENCY
DEFENSE PERSONNEL SUPPORT CENTER
DLA/DSCP

On appeal From the United States District Court
For the Eastern District of Pennsylvania
(E. D. Pa Civ. No. 04 cv-2210)
District Judge: Honorable John P. Fullam, Sr.

Submitted Under Third Circuit LAR 34.1 (a)
May 22, 2006

BEFORE: McKEE, FUENTES and NYGAARD, CIRCUIT JUDGES

(Filed: May 24, 2006)

OPINION OF THE COURT

PER CURIAM

Betty J. Blue filed this Title VII employment discrimination action pro se, alleging that her employer, Defense Logistics Agency/Defense Personnel Support Center ("DLA/DSCP"), discriminated against her on the basis of her race and sex. At the time she filed her administrative complaint with the EEOC, Blue, who is African American, was a Contract Specialist GS-11 and had worked for DLA/DSCP for over twenty years. In her complaint, Blue alleges

that she responded to a job announcement for a Contract Specialist GS-12 in March of 1999, and that, despite her qualification, she was not selected after her interview. Blue also seeks class certification to represent 500 African American women employee of DLA/DSCP occupying positions graded as GS-6 through GS-12 applicants for the position. Blue's statistics are too general The District Court granted Appelees' motion for summary judgment, holding that Blue had failed to establish a prima facie case of discrimination under Title VII, because she presented no evidence that a non-class member in substantially similar situation were promoted. Blue filed a motion for reconsideration of that order, which the District Court's denied. Blue timely filed this appeal form both of the District Court's order, again proceeding pro se. In her brief on appeal, Blue raises four issues, which we will address in turn.

Blue's first challenges the District Court's grant of summary judgment to Appellee. Our review of the District Court's grant of summary judgment is plenary, and we apply the same legal standard used by the District Court, viewing the evidence in the light most favorable to the non moving party and drawing all reasonable inference in that party's favor. See Pacitti v. Macy's, 193 F.3d 766, 722 (3d Cir. 1999). After reviewing the record, we agree with the District Court that Blue has not made out a prima facie case of discrimination and that Appellee thus was entitled to summary judgment.

DLA/DSCP is a buying activity of the Department of Defense, which purchases clothing, medical supplies, food and other items for the United States' military worldwide.

APPENDIX-A

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin "42 U. S. C. 2000e2(a)(1). Title VII's protections were extended to federal government employees in 1972 by passage of the Equal Employment Opportunity Act. **Title VII is the exclusive remedy for federal employees bringing employment discrimination claims.** Brown V. Gen. Services Admin. 425 U. S. 820 (1976). In order to show discrimination under Title VII, a plaintiff must first establish a prima case by a preponderance of the evidence. Texas Dept. of Community Affairs v. Burdine. 450 U. S. 248, 252-53 (1981). To establish a prima facie case for discriminatory non-promotion using indirect evidence, a plaintiff must show that she is a member of protected class; that she was qualified for, applied for, and rejected for a position; and that non-member of the protected class were treated more favorably. See McDonnell Douglas v. Green, 411 U. S. 792, 802 (1973); Bennum v. Reuters State Univ.; 941 F.2d 154 170 (3d Cir. 1991) (internal citation omitted) If the employee plaintiff cannot make this showing, the employer is entitled to judgment as a matter of law. Pivirotto v. Innovative Systems, Inc.191 F. 3d 344, 352 n. 4 (3d Cir. 1999)

We agree with the District Court that, although Blue fulfills the first two requirements for a prima facie case, she is a member of a protected class and she was not promoted to a position for which she was qualified, she has no provided sufficient facts to meet the third requirement of the test- that similarly situated non-class members were treated more favorably. Blue, thus failed to establish the required "casual nexus between [her] membership in a protected class and the and the decision not to [promoted her]" See Santullo v. United States Postal Service. 352 F. 3d 798 (3d Cir 2003).

In support of her summary judgment motion, Blue submitted excepts from a presentation made at the NAACP Federal Sector Task

Force Breakfast in October 1998, which included statistics related to the overall racial composition of the workforce at DLA/DSCP in the 1990s. Although statistical evidence can be used to prove employment discrimination, it is not irrefutable, and its usefulness "depends on all of the surrounding facts and circumstances." Int'l Bhd. Of Teamster v. United States, 431 U. S. 324, 339-40 (1977). In order to be useful in establishing a prima facie case, statistics must assist the plaintiff in proving discrimination in her particular case. Krodal v. Young, 748 F 2d 701 (D. c Cir 1984).

The statistical reports in Blue's pleadings do not refer to the particular Contract Specialist position she applied for in 1999. Neither do they show the racial or gender composition of the applicant pool or the race or gender of the successful applicants for the position. Blue's statistics are too general to be relevant or useful in establishing a prima facie case of discrimination..

Blue is not required to demonstrate that the position she sought was filled by a non-class member in order to establish a prima facie case See Pivirotto, 191 F. 3d at 352. See also O' Connor v. Consol, Caterers Corp., 517 U. S. 308, 311-12 (1996). Therefore, contrary to Appellee's argument and the District Court's implication, Blue's statement that one of the selectees for the position was a Black Female. " while not supportive of her claim, is not dispositive on the question of discrimination

See e.g.Ezold v. Wolf Block, Schorr and Solis-Cohen, 983 F. 2d 509, 542-43 (3d Cir. 1992) (statistical evidence too general to establish pretext); Molthan v. Temple Univ. of Com. System of Higher Educ., 778 F.2d 955, 963 (3d Cir 1985) (same). In sum, Blue's evidence does not create an inference that her non-selection in 1999 was based on a discriminatory reason. See Teamster, 431 U, S. at 358.

Blue's second challenge on appeal is to the District Court's denial of class certification. We review a decision granting or denying class certification for abuse of discretion. In re LifeUSA Holding Inc., 242 F. 3d136. 143 (3d Cir. 2001). An abuse of discretion is found if the District Court's decision "rests upon a clearly erroneous finding of fact, and errant conclusion of law of an improper application of law to fact". In re General Motors Corp. Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995) (citations and quotations omitted). Although a court should be cautious in making a class certification decision base on its own impression of he merits of a case, some inquiry into the factual and legal issues underlying a plaintiff's cause of action is usually necessary. Newton v. Merrill Lynch. Pierce, Fenner & Smith, Inc., 259 F. 3d 154, 166-67 (3d Cir. 2001).

Four prerequisites must be met to obtain certification of a class: 1) the class is so numerous that the joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. See Fed R. Civ. P. 23(a). A district court can only certify a class if all four requirements of Rule 23(a) are met. In re Prudential Ins. Of America Sales Practices Litigation. 148 F.3d 283, 308-09 (3d Cir 1998).

We agree with the District Court that Blue cannot fulfill the requirements of Rule 23(a). Even if we were to accept Blue's argument that the first three requirements (9)numerosity,

commonality, and typicality) are met, as a pro se plaintiff, she cannot adequately represent the interests of other class members. See Fymbo v. State Farm Fire & Cas. Co., 213 F. 3d 1320. 1321 (10th Cir 2000). See also C. E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (holding that a pro se litigant may not appear as an attorney for others). We further note that, even if Blue were represented by an attorney, she would not "possess the same interests and suffer the same injury" as the class she purports to represent, because she, herself, has not made a prima facie showing of discrimination. See East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U S. 395, 403-04 (1977). We agree with the District Court that it would be unfair to bind all of the potential class members to the outcome of Blue's case and therefore, find no abuse of discretion in the District Court's denial of class certification.

Blue's next challenges the District Court's amendment of the caption of her complaint by replacing "Defense Logistics Agency/Defense Personnel Support Center" with "Secretary of the Department of Defense Donald H. Rumsfeld," as the sole defendant. The relevant statutory provision governing Title VII suits against the federal government requires that "the head of the department, agency, or unit, as appropriate, shall be the defendant." See 42 U. S. C. 2000e-16c). Blue argues that the caption change was erroneous, because her employer, Defense Logistics Agency, is the entity which allegedly engaged in the discriminatory conduct. Appelle argues that Donald Rumsfeld, as head of he Department of Defense, is the proper defendant. On its face, the statue accommodates both parties' interpretations, as it allows for the head of a department (such as the Department of Defense) or agency (such as Defense Logistics Agency) to be named as the defendant. We note that Blue's interpretation enjoys some support. See e.g., Adams v. E.E.O.C., 932 F Supp. 660, 664, n3 (E. D. Pa. 1996) (Director of Defense Logistics Agency was only proper defendant in a Title VII action); William's v. McCausland, 791 F. Supp. 992, 997 (S. D. N. Y. 1992) (same). We need not delve more deeply into this issue, however, as we conclude that the caption change was neither an abuse of discretion nor relevant to the outcome of Blue's case.

Blue also challenges the District Court's denial of her motion for reconsideration. We review this order for abuse of discretion. See Harsco Corp. v. Zlotnicki, 799 F.2d 906,909 (3d Cir. 1985). The purpose of a motion for reconsideration is to correct manifest errors of law of fact or to present newly discovered evidence. See id The District Court properly denied Blue's motion. We agree that, aside from her new argument that the cases cited by Appelle were invalid because they were "antiquated," Blue's motion did nothing more that restate her previous arguments.

Accordingly, we will affirm the judgment entered by the District Court

APPENDIX B—-MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 14, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civ. No. 04-2210

BETTY J. BLUE

Plaintiff

v.

DEFENSE LOGISTICS AGENCY,
DEFENSE PERSONNEL SUPPORT CTR.
DLA/DSCP,

Defendants

MEMORANDUM AND ORDER

John P. Fullam Sr, Judge

On June 9, 2004, this Court denied pro se Plaintiff, Betty Blue's motion for summary judgment and granted Defendant, Secretary of the Department of Defense, Donald Rumsfeld's cross-motion for summary judgment. Ms. Blue now moves the court to reconsider. For the following reason, the motion will be denied.

Reconsideration should be granted if the moving party can show: 1.) and intervening change in controlling law, 2) evidence not available when the court entered summary judgment has recently become available, or 3.) there is a need to correct a clear error of law of prevent manifest injustice. See North River Ins. Co., v CIGNA Reinsurance Co., 52 F. 3d 1194, 1218 (3d Cir 1995) The purpose of

reconsideration is not to reargue matters already decided or to relitigate a point of disagreement between the court and the parties. Abu-Jaml v. Horn, No. Civ.A. 99-5089, 2001 WL 1609761 at 89 (E. D. Pa 2001). Ms. Blue's motion to reconsider does little more that restate the arguments she advanced in her motion of summary judgment. She does not present a manifest injustice or any clear errors of law or fact.

In the only new argument raised in her motion to reconsider, Ms. Blue contends that Defendants' cases are inapplicable because they pre-date the Government Employee Rights Act of 1991. This argument fails because the enactment of a statue does not automatically nullify all prior case law.

In her complaint, Ms. Blue failed to allege fact sufficient to establish a claim for employment discrimination. Ms. Blue alleged she and others suffered gender and race discrimination while employed at Defense Supply Center Philadelphia (DSCP), a buying activity of the Defense Logisitics Agency (DLA) under the Department of Defense (DOD). She brought her claim under Title VII of the Civil Rights Act and ask this Court to certify a class including all African American females occupying positions within grade level General Schedule (GS) 6 through GS-12 at the DSCP.

Ms. Blue's claim for failure to promote her to Contract Specialist GS-12 in 1999 is the only claim for which she exhausted all her administrative remedies as required by Title VII. To properly state a claim for employment discrimination under Title VII, a plaintiff must allege: 1) she is a member of a protected class, 2) she was rejected for the position or promotion and 4) individual not of plaintiff's protected class were treated more favorably. See Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F. 2d F. 2d 509 522 (3d Cir. 1992).

As an African Amerie~~an female~~, Ms Blue is a member of two protected classes. For present purposes, we can assume her referral for an interview indicates she was qualified for the position. Ms. Blue was not promoted to this position. However, she fails to allege

that the position was given to a similarly situated applicant not of Ms. Blue's protected classes: in fact, Ms. Blue states another African American woman filled one of the two available positions. While Ms. Blue does make several general claims of discrimination, she fails to assert facts upon which a reasonable jury could find in her favor.

Despite Ms. Blue's noble efforts to champion the rights of victims of discrimination, I cannot grant her request for class certification. To be certified, a class must satisfy the following requirements listed in Fed. R. Civ. P. 23 (a): 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of representation. Once those requirements are met, one seeking class certification must also satisfy one of the requirements of Fed. R. Civ. P 23b).

Ms. Blue has not sufficiently stated her own claim: therefore, she cannot satisfy the commonality and typicality requirements. More significantly, Ms. Blue is acting pro se and cannot adequately represent the class. Despite Ms. Blue's earnest attempts, it would be unjust to bind other members of the proposed class to the efforts of a prose plaintiff.
Because she does not satisfy-the requirements of Fed. R. Civ. P. 23 (a) I need not consider whether she meets on to the Fed./ R. Civ. P. 23(b) requirements.

An Order follows:

ORDER

AND NOW, this 14th day of July 2005, upon consideration of Plaintiff's "Request for Reconsideration", the response thereto, and this Court's decision dated June 9, 2005 is hereby ordered that Plaintiff's motion is DENIED.

s/John P. Fullam, Sr. J.

APPENDIX C—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 18, 2006

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No 05-3585

BETTY J. BLUE

Appellant

v.

DEFENSE LOGISTICS AGENCY,
DEFENSE PERSONNEL SUPPORT CTR.
DLA/DSCP

On appeal From the United States Districts Court
For the Easter District of Pennsylvania
(E. D. Pa. Civ. No. 04-cv-2210
District Judge: Honorable John P. Fullam, Sr.

Submitted Under Third Circuit LAR 34. 1(a)
May 22, 2006

SUR PETITION FOR PANEL REHEARING

Present: McKEE, FUENTES and NYGAAED,
Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this pane, the Petition for Rehearing is hereby DENIED

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge